

discrimination, or reprisal at any stage in the presentation or processing of a complaint of discrimination. An allegation of reprisal may be processed under this regulation, a negotiated grievance procedure where applicable, or the appellate provisions of the MSPB (mixed case).

§ 588.46 Mixed cases.

(a) A mixed case complaint is either—

(1) A complaint of employment discrimination or reprisal filed under this regulation, related to or stemming from an action taken by the Army against the complainant, which action may be appealed to the MSPB pursuant to any law, rule, or regulation.

(2) A complaint of sex-based wage discrimination filed with the EEOC, related to or stemming from an action taken by the Army against a complainant, which may be appealed to the MSPB, pursuant to any law, rule, or regulation.

(b) Examples of action appealable to the MSPB are removals, suspensions for more than 14 days, reductions in grade (demotion), reductions in force, denials of within-grade increases, and furloughs for 30 days or less.

(c) *Mixed case appeals.* (1) A mixed case appeal is an appeal filed with the MSPB which alleges that an Army action resulted, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, mental or physical handicap, age, and/or reprisal, or alleges that such Army action resulted in sex-based wage discrimination.

(2) If an employee files an appeal with the MSPB on a mixed case, before filing a formal complaint of discrimination with the Army, the Army activity must reject or cancel any complaint on the same matter, regardless of whether the allegation of discrimination is raised in the appeal to the MSPB. Upon such rejection or cancellation, the Army activity must advise the employee to raise the allegation of discrimination in connection with his or her appeal to the MSPB. If the employee first files a formal complaint with the Army under this regulation, before filing an appeal on the same matter to MSPB, the Army must

advise the MSPB and request that it dismiss the appeal without prejudice. The Army, thereafter, shall process the complaint in a manner similar to any other complaint, except that there will be no hearing before the EEOC and the complaint's appeal rights will be to the MSPB, not to the EEOC.

(d) *Election.* A mixed case complaint may be presented initially as a discrimination complaint under this regulation or under a negotiated grievance procedure, if applicable, or as part of an appeal to the MSPB as set forth in FPM Supplement 990-1, MSPB regulations, or part 1201, title 5, Code of Federal Regulations (5 CFR part 1201). Employees who wish to appeal must choose the system under which they wish to proceed. Whichever formal action the employee files first is considered an election to proceed in that forum as to the alleged discrimination. The Army will inform every employee who is the subject of an action which is appealable to the MSPB, of the right to file a mixed case complaint with the Army, or to file a mixed case appeal with MSPB if the employee has raised the issue of discrimination during the processing of the personnel action but prior to the decision to effect that personnel action.

(e) *Timely processing.* A mixed case complaint will be processed in a timely manner, so that the final Army decision is issued within 120 calendar days from the date the complaint was filed.

(f) *Processing complaints on proposals.* (1) Any complaint filed in connection with an Army proposal to take an action that is appealable to the MSPB will be consolidated with any subsequent mixed case complaint filed in connection with the Army's decision to take such an action, either as proposed or as modified during the processing of the proposal.

(2) If, following a complaint on a proposal, the complainant files an appeal with the MSPB on the subsequent Army decision resulting from that proposal, the EEO officer will cancel the complaint on the proposal. The complainant will be advised by the EEO officer that any allegations of discrimination contained in that complaint should be raised with the MSPB in connection with the pending appeal.

(3) When a complaint concerning a proposal to take an action appealable to the MSPB is combined with a mixed case complaint concerning an Army decision appealable to the MSPB, the 120-calendar-day time frame for processing the consolidated complaint begins as of the date the complaint concerning the Army decision is filed.

(4) When a complaint is filed on a proposal, and no appeal or complaint is filed with the NSPB or the Army on the subsequent appealable Army decision resulting from that proposal, the complaint on the proposal will include the final appealable Army decision as an issue. The 120-calendar-day time-frame will begin as of the effective date of the final appealable decision.

(g) *Mixed case advise.* Sample language advising complainants of their rights under mixed case procedures is at appendix D. In age discrimination complaints, a complainant must appeal the Army decision to the EEOC or MSPB before filing a civil action in a Federal District Court.

§ 588.47 Negotiated grievance procedure.

A complainant who is covered by a collective bargaining agreement may file allegations of discrimination or reprisal under the negotiated grievance procedure instead of filing under this regulation. The complainant has this grievance option if the negotiated grievance procedure does not exclude allegations of discrimination or reprisal. When using the negotiated grievance procedure, a complainant is bound by the negotiated agreement.

§ 588.48 Election of forum.

(a) In a mixed case, the complainant may initially choose either the individual complaint procedure as described in subpart B of this regulation, appeal the the MSPB, or use the negotiated grievance procedure. The rules for choosing the procedure are not the same in all situations. An election will have been made when the following action occur:

(1) An MSPB appeal will not be accepted if a timely discrimination complaint or a grievance under the nego-

tiated procedure has been filed in writing.

(2) A discrimination complaint will not be accepted if a timely appeal to the MSPB or a timely grievance under the negotiated procedure has been filed in writing.

(3) A grievance under the negotiated procedure will not be accepted if a timely appeal to the MSPB has been filed in writing or if the complainant has initiated timely action under subpart B of this regulation. If the negotiated grievance procedure is used, the employee may ask the MSPB to review the final decision made under the negotiated procedure. (See § 588.49.)

(b) In a matter involving discrimination covered by the negotiated grievance procedure, but not appealable to the MSPB, the complainant may choose either the complaint procedure as described in subpart B or use the negotiated grievance procedure.

(1) The choice is made when a timely grievance is filed in writing under a negotiated procedure or when the employee files a formal complaint under subpart B.

(2) An employee who chooses the negotiated grievance procedure may ask the EEOC to review the final decision made under that negotiated procedure. (See § 588.49.)

§ 588.49 Final decision under the negotiated grievance procedure.

For seeking review by the EEOC or the MSPB, a final decision under the negotiated grievance procedure is defined as one of the following:

(a) The final grievance decision rendered by the activity, if the union fails to invoke arbitration of the grievance (an employee cannot individually invoke arbitration.)

(b) The award rendered by an arbitrator, if neither the union nor management files an exception to the award with the Federal Labor Relations Authority (FLRA) (an employee cannot individually appeal an arbitration award to the Authority) or an arbitrator's award that cannot be appealed to the FLRA.

(c) The decision of the FLRA on appeal of an arbitration award.